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No. 87-259

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1987

BEECH AEROSPACE SERVICES, INC.,
Petitioner,

v.

JOHN C. RAINEY and
RONDI M. KNOWLTON,
Respondents.

Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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December 18, 1987

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QUESTIONS PRESENTED FOR REVIEW

I. Whether evaluative conclusions contained in a trustworthy investigative report, prepared pursuant to law and the Manual of the Judge Advocate General, are admissible pursuant to Federal Rule of Evidence 803(8)(C)?

II. Whether Federal Rule of Evidence 106 can be raised for the first time on appeal to support admission of otherwise inadmissible opinion testimony?

PARTIES TO PROCEEDING

1. John C. Rainey
2. Rondi M. Knowlton
3. Beech Aircraft Corporation
4. Beech Aerospace Services, Inc.
5. Pratt & Whitney Canada, Inc.
6. Raytheon Company is the parent corporation of Beech Aircraft Corporation and Beech Aircraft is the parent corporation of Beech Aerospace Services., Inc.
7. United Technologies Corporation is the parent corporation of Pratt & Whitney, Canada, Inc.
8. Underwriters at Lloyds of London and certain British companies; La Reunion Aeroienne; Aviation Office of America; and Skandia Insurance Company, Ltd., are the insurers of Beech Aircraft Corporation and Beech Aerospace Services, Inc.

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals below is reported at 827 F.2d 1498 (11th Cir. 1987). (App. 1a-40a).

The order granting the rehearing *en banc* is reported at 791 F.2d 833 (11th Cir. 1986). (App. 41a-42a).

The original opinion of the Court of Appeals is reported at 784 F.2d 1523 (11th Cir. 1986). (App. 43a-56a).

The final judgments for defendants on jury verdicts in the United States District Court for the Northern District of Florida (Pensacola Div.) were not reported. (App. 57a - 58a).

JURISDICTION

The *en banc* opinion of the Eleventh Circuit Court of Appeals was entered on September 22, 1987 and reinstated the panel opinion entered on March 25, 1986. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

FEDERAL RULES OF EVIDENCE INVOLVED

1. Federal Evidence Rule 803(8)(C) *Hearsay Exceptions; Availability of Declarant Immaterial* provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (8) *Public records and reports*. Records, reports, statements or data compilations, in any form, of public offices or agencies, setting forth . . .
>
> (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicated lack of trustworthiness.

2. Federal Evidence Rule 106 *Remainder of or Related Writings or Recorded Statements* provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him, at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

STATEMENT

BACKGROUND

On July 13, 1982, LCDR Barbara Ann Rainey, a Navy primary flight instructor, and her student, ENS. Donald Bruce Knowlton, were in a fatal airplane crash while practicing "touch and go" landings at Middleton Field, Alabama. Wrongful death actions[1] were filed by their respective spouses in U.S. District Court in Pensacola, Florida, against Beech Aircraft Corporation ("Beech"), Pratt & Whitney Canada, Inc. ("Pratt") and Beech Aerospace Services, Inc. ("BASI"). The complaint alleged negligence and strict liability on the part of Beech and Pratt for defective design and/or manufacture and negligent maintenance of the aircraft engine by BASI who was the civilian maintenance contractor for the Navy.

Specifically, plaintiffs contended the proximate cause of the crash was a defect in the fuel control unit which on occasion would result in an uncommanded loss of power during flight. Defendants contended the fatal mishap was the result of pilot error. The cases were bifurcated and proceeded to trial on the sole issue of liability.

JAG REPORT

Both sides relied heavily on the opinions developed by expert witnesses to support their respective theories on the cause of the crash. The defendants also relied on the opinions contained in the investigative report prepared by LCDR William C. Morgan, Jr. Morgan was appointed the day after the crash to investigate the accident in accordance with the Manual of the Judge Advocate General, Chapter IX, 0902 at 9-3 and 9-5.

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[1]Pursuant to Florida Statute § 768.16 *et. seq.* (1981)

After a six-week investigation, LCDR Morgan filed a formal written investigative report consisting of a six-page summary with 60 supporting documents termed "enclosures" ("JAG Report"). The summary consisted of "a preliminary statement, findings of fact, opinions and recommendations."[2] LCDR Morgan concluded that there were no maintenance deficiencies and no irregularities which could be specified as the cause of the crash. Morgan found that the deceaseds' aircraft climbed into the traffic pattern immediately in front of another aircraft. In maneuvering to avoid a mid-air collision, the plane lost flying speed and crashed. He concluded the most probable cause of the crash was pilot error. This report was then reviewed and endorsed by the commanding officers of the local training squadron and air wing, the Chief of Naval Education and Training, and the Chief of Naval Operations. It was then accepted by the Judge Advocate General of the United States Navy. None disagreed with any of Morgan's opinions that were admitted into evidence at trial.

At a pretrial conference on March 20, 1984, the trial judge first addressed the issue of admissibility of the JAG Report. During these discussions, Rainey and Knowlton's counsel admitted that the report was a public record and there was no evidence to indicate that it was untrustworthy. The judge ruled the report was trustworthy, but initially, held that only the factual findings and not the evaluative conclusions could be admitted into evidence. At a subsequent hearing the day before trial, the judge reversed this ruling and allowed relevant opinions to be admitted at trial. This included LCDR Morgan's conclusion that the most probable cause of the accident was pilot error. In light of the ruling, the judge granted Rainey and

[2]The entire content of this report excluding the 60 enclosures is set forth in Judge Tjoflat's specially concurring opinion in the *en banc* opinion. (App.8a-16a).

Knowlton leave to introduce evidence concerning the trustworthiness of the opinions, call witnesses in addition to those previously disclosed, offer any evidence that the accident was not caused by pilot error and offer additional instructions to the jury concerning the JAG Report. Plaintiffs' counsel did none of these nor did they seek a continuance nor move for a mistrial at any time. The JAG Report, including the relevant evaluative conclusions, was admitted into evidence.

CROSS-EXAMINATION OF RAINEY

LCDR John Rainey was called to testify as an adverse witness and on direct examination was questioned concerning contents of a letter he had written LCDR Morgan prior to publication of the JAG Report. Rainey conducted his own inquiry into the circumstances surrounding the death of his wife and her student. The questions to Rainey were strictly limited to objective facts involving unnecessary pressure on the pilots prior to flight and the final flight maneuvers of the aircraft. During direct examination Rainey was never asked whether his letter contained an opinion as to the cause of the accident. On cross-examination, Rainey's own counsel sought to elicit an opinion from Rainey as to the most probable cause of the accident. The trial judge sustained the defendants' objections on the grounds Rainey had not been qualified as an expert witness. No effort was made by Rainey's counsel to qualify him as an expert on cross-examination or on plaintiffs' case on rebuttal. Nor was there an attempt by any party at any time to offer the letter into evidence. Further, there was no proffer of any of this evidence, nor a motion for a mistrial, continuance or other protective or curative effort.

After two weeks of trial by experienced trial counsel before a veteran judge, the jury concluded there was no negligence

and no defect in design and returned a verdict in favor of the defendants.

ELEVENTH CIRCUIT OPINIONS

On appeal the Eleventh Circuit Court of Appeals concurred with the plaintiffs that reversible error had occurred in these two evidentiary rulings. Despite the great weight of authority holding evaluative conclusions in public records admissible under Rule 803(8)(C), the court concluded it was bound by *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980),[3] to hold that the JAG Report was improperly admitted. The Eleventh Circuit held that the cross-examination of Rainey was improperly restricted in violation of Fed.R.Evid. 106 and remanded the case for a new trial.

In a specially concurring opinion Circuit Judge Johnson noted that *Smith*[4] "is an anomaly among the circuits" and urged reconsideration by the full court of the admissibility of evaluative conclusions under Rule 803(8)(C). A rehearing *en banc* was granted, but the court split six-six on this point. The court concurred that the cross-examination of Rainey had been improperly limited, and the case was reversed and remanded.

ORIGINAL TRIAL JURISDICTION

The trial court had diversity jurisdiction pursuant to 28 U.S.C. 1332.

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[3]The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981, when the Eleventh Circuit was formed.

[4]*Smith* involved the use of evaluative conclusions in a Coast Guard investigation into the cause of an explosion of a ship due to benzene fumes. Plaintiff attempted to use these conclusions to establish Smith died from benzene fumes inhaled several weeks earlier. The trial judge ruled they were inadmissible under these circumstances, and the Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

A. A sharp and distinct conflict exists between the Eleventh Circuit's opinion construing Fed.R.Evid. 803(8)(C) and the other Circuit Courts of Appeal.

A sharp and distinct conflict exists between the *en banc* opinion below and at least nine other circuits. The overwhelming majority liberally interprets the term "factual findings" to include evaluative conclusions. At the time of the trial below, only the Fifth Circuit decision of *Smith v. Ithaca Corp.*, 612 F.2d. 215 (5th Cir. 1980), utilized the strict interpretation excluding from evidence evaluative conclusions in public reports.

The conflict over the admissibility of evaluative conclusions is rooted in the adoption of the rule itself and can only be resolved by this Court. The House Judiciary Committee qualified its acceptance of the rule by stating that it intended the phrase "factual findings" to be strictly construed and that evaluative conclusions contained in public reports should be excluded from evidence. The Senate Committee on the Judiciary, joined by the Advisory Committee, strongly disagreed and approved the rule, urging a liberal interpretation by admitting evaluative conclusions. The Advisory Commitee's Note accepted evaluative reports as being within the scope of Fed.R.Evid. 803(8)(C).

One of the first and perhaps the most widely recognized analyses of Rule 803(8)(C) is found in *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed. 2d 661 (1979). The *Baker* opinion paid careful attention to the legislative history and Advisory Committee Notes.

This Sixth Circuit decision provided the initial momentum for the liberal interpretation of the rule admitting evaluative conclusions.

The Third Circuit likewise has adopted the broader construction of the rule. *Melville v. American Home Assurance Company*, 584 F.2d 1306, 1316 (3d Cir. 1978), is also recognized as a leading authority on the issue. The appellate court sought to guide the trial judge on evidentiary issues following a reversal on other grounds, holding:

> The district judge followed the Advisory Committee's Notes in concluding that the Airworthiness Directives were admissible under Rule 803(8)(C) even though they contained evaluative materials. In our opinion the trial judge was correct in this determination since the proviso to Rule 803(8)(C) permits exclusion of such reports if evidence of lack of trustworthiness is introduced. This exclusionary mechanism provides a sufficient safeguard against the admission of unreliable evidence.
>
> 584 F.2d at 1316.

Evaluative conclusions contained in aircraft accident JAG Reports identical to the one at hand have been properly admitted into evidence. *Sage v. Rockwell International Corp.*, 477 F.Supp. 1205 (D.N.H. 1979); *In Re Air Crash Disasters at Manneheim, Germany*, 586 F.Supp. 711 (E.D.Penn. 1984), reversed on other grounds, 769 F.2d 115 (3d Cir. 1985). The court in *Manneheim* observed:

> [I]t is now settled that evaluative reports (i.e. those containing normative conclusions in addition to a recitation of facts) are admissible. [Citing cases.] Accordingly, there is no question that the JAG report itself is admissible under Fed.R.Evid. 803(8)(C).
>
> 586 F.Supp. at 725.

Additionally in *Shaw v. Grumman Aerospace Corp.*, 593 F.Supp. 1066 (S.D.Fla. 1984), *aff'd* 778 F.2d 736 (11th Cir. 1985), the opinion portion of his JAG Report was adopted by

reference by the investigator while testifying from the stand rather than offered independently.

Weinstein observes that there are sufficient safeguards for escape, if a lack of trustworthiness is demonstrated. '[I]f the report states a conclusion that would be helpful — and is reliable — it should be admitted.'' 4 Weinstein's *Evidence* 803(8)[03] at 803-251.

The dominate view throughout the nation favors a broad interpretation of Rule 803(8)(C). The following representative authorities all support the admissibility of evaluative conclusions in public reports and demonstrate the substantial nature of this conflict.

Circuit	Case	Ruling
First	*Robbins v. Whelan*, 653 F.2d 47 (1st Cir. 1981), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981)	Error to exclude National Highway Safety Board report which included evaluative conclusions.
Second	*Litton Systems, Inc. v. American Telephone & Telegraph*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984 79 L.Ed.2d 220 (1984)	FCC reports containing evaluative conclusions were properly admitted.
Third	*Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), *cert denied*, 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978)	Report of Coast Guard including evaluative conclusions were admissible in Jones Act litigation
	Melville v. American Home Assurance Co., 584 F.2d 1306 (3d Cir. 1978)	FAA materials containing evaluative conclusions were admissible

	In Re: Japanese Electronic Products, 723 F.2d 238 (3d Cir. 1983)	Error to exclude evaluative conclusions on trade practices in Treasury Department report
Fourth	*Ellis v. International Playtex, Inc.*, 745 F.2d 292 (4th Cir. 1984)	Error to exclude CDC and state health department reports containing evaluative conclusions and statistical findings.
Fifth	*Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)	FAA advisory materials including evaluative conclusions were properly admitted.
	Mac Towing, Inc. v. American Commercial Lines, 670 F.2d 543 (5th Cir. 1982)	Contents of Coast Guard report establishing fault were admissible.
Sixth	*Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979)	Evaluative conclusion in Highway Patrol report was admissible.
	In Re: Paducah Towing Co., Inc., 692 F.2d 412 (6th Cir. 1982)	Administrative Law Judge's conclusions with respect to reasonableness of a tug boat captain's actions were properly admitted.
Seventh	*Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986)	EEOC Report containing evaluative conclusions was properly admitted.

Eighth	*Kehm v. Proctor & Gamble*, 724 F.2d 613 (8th Cir. 1983)	CDC studies containing evaluative conclusions on causes of toxic shock syndrome were properly admitted.
Ninth	*Plummer v. International Hotels Co.*, 656 F.2d 502 (9th Cir. 1981)	Error to exclude EEOC report containing evaluative conclusion of probable cause of discrimination.
Tenth	*Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986)	Shooting Review Board report containing evaluative conclusions that police officer acted within department guidelines was properly admitted.

Smith v. Ithaca Corp., 612 F.2d 215 (5th Cir. 1980), the sole authority relied upon by the Eleventh Circuit, is an isolated departure from the traditional approval by the Fifth Circuit in admitting evaluative conclusions under Rule 803(8)(C) and its predecessor. In *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), the Fifth Circuit held admissible an EEOC report containing a summary of the charges, a brief review of the facts developed in the investigation, and a finding of probable cause that violations existed. In holding the trial court erred in failing to admit the report into evidence, the Fifth Circuit specifically rejected the argument that the report was inadmissible because it contained evaluative or conclusionary findings as to probable cause.

Other Fifth Circuit decisions demonstrate the admissibility of both factual findings and evaluative conclusions when reliable and trustworthy. In *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975), the court held that FAA advisory materials containing evaluative conclusions were

trustworthy and relevant to the issue of negligence. The Fifth Circuit itself has considered *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), of no precedential value. Without citation to *Smith*, the Fifth Circuit in recent opinions has determined evaluative conclusions in public reports are admissible. In *Mac Towing, Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir. 1982), a Coast Guard accident report which attributed all the blame for a collision to one vessel was admitted into evidence in its entirety. See also the Fifth Circuit holdings in *Matthews v. Ashland Chemical, Inc.*, 770 F.2d 1303 (5th Cir. 1985); *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985); *Local Union No. 59 v. Namco Electric, Inc.*, 653 F.2d 143 (5th Cir. 1981); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); *cert. denied*, 499 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); and *Hodge v. Seiter*, 558 F.2d 284 (5th Cir. 1977). It is clear that the Fifth Circuit has adopted the liberal interpretation of the rule admitting evaluative conclusions despite the reasoning enunciated in the *en banc* opinion below.

Despite these Fifth Circuit cases to the contrary, the Eleventh Circuit Court of Appeals somehow felt bound by the ruling in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). This case can clearly be distinguished. In *Smith* the Fifth Circuit excluded evaluative conclusions contained in a Coast Guard report investigating an explosion due to ignition of benzene fumes resulting in the sinking of a vessel. The explosion occurred several weeks after the death of Smith, a seaman who had previously served on board the same vessel. Smith contended death was caused by inhalation of benzene fumes on voyages prior to his death. The trial judge found the conclusions unrelated to the issues in the wrongful death claim being litigated. *Smith* is simply not applicable to the facts at hand.

To allow the Eleventh Circuit's decision to stand would destroy the uniform application of the Federal Rules of

Evidence and frustrate the consistent administration of justice. Under this construction of the rule, trial judges must now make hairsplitting fact/opinion determinations which have been consistantly rejected in other areas as unworkable. Clear-cut distinctions between fact and opinion are often impossible to draw, and the volume of cases requiring appellate review would drastically increase. Disparate ruling among the circuits on such a critical rule of evidence will invariably lead to forum shopping and ultimately an imbalance in the rendition of justice. The time-proven value of public agency investigative reports will be rendered impotent and result in the absolute waste of the valuable human and financial resources behind them. The instant case involves an accident investigation, but the restriction now imposed by the Eleventh Circuit on admission of evaluative conclusions contained in public records has a far-reaching effect on other litigation. This notably includes discrimination and civil rights actions which for years have depended upon reports containing evaluate conclusions as to probable cause. This will cripple the advancement of social reform and justice which our country has enjoyed in recent decades.

A review of the overwhelming number of cases requiring a liberal application of the rule admitting evaluation conclusions in public reports demonstrates the invaluable nature of this form of evidence. There are ample protective safeguards which can be utilized by opposing counsel to test the trustworthiness of these reports. The Eleventh Circuit's decision sharply and distinctly conflicts with *Baker v. Elcona Homes Corp.*, 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 993, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979), *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978), and the wealth of other cases cited. The rapidly increasing quantity and variety of public records containing evaluate conclusions which would

be of great value to the trier of fact make it certain that this conflict will infect the orderly progress of judicial proceedings. The critical nature of the admissibility of evaluate conclusions under Rule 803(8)(C) mandates a uniform ruling throughout the circuits.

B. The Eleventh Circuit's opinion utilizing Rule 106 to admit otherwise inadmissible lay opinion testimony departs from the accepted and usual course of judicial proceedings.

The trial judge quite properly refused to allow Rainey's counsel on cross-examination to elicit Rainey's opinion as to the probable cause of his wife's crash. Not only did this subject exceed the scope of direct examination, but Rainey had not been and never was qualified as an expert on the aircraft's engine and fuel control unit. The Eleventh Circuit reversed the trial judge's exclusion of this evidence based on Fed.R.Evid. 106 which was *improperly* raised for the first time on appeal. This strained interpretation fractures the very purpose and intent of Rule 106 and has so far departed from the accepted and usual course of judicial proceedings so as to require corrective intervention by this court.

Rule 106 controls only the *order* of *admissible* proof. It clearly is not intended to transform inadmissible evidence into that which is admissible. This interpretation of Rule 106 was aptly expressed by the Sixth Circuit in *United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1980):

> The rule covers an order of proof problem, it is not designed to make something admissible which should be excluded. [Citing cases.]

A party may not use Rule 106 as a vehicle for admitting otherwise inadmissible testimony. In *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983), the Court stated: "[I]n any

event, Rule 106 does not render admissible evidence which is otherwise inadmissible." See also *United States v. Burreson*, 643 F.2d 1344 (9th Cir. 1981). This, however, is the inescapable misuse of Rule 106 which will result from the Eleventh Circuit's ruling.

Rule 106 is not applicable in the case at hand because the disputed testimony was not offered to explain or qualify those portions of the letter about which Rainey was questioned on direct examination. See *United States v. Walker*, 652 F.2d 708 (7th Cir. 1981); *United States v. Soures*, 736 F.2d 81 (3d Cir. 1984). The direct examination of Rainey focused on certain factual matters contained in the letter, and no questions were asked on direct examination pertaining to Rainey's theories on the probable cause of the accident. When his own counsel sought to elicit such an unqualified opinion from Rainey, it not only was beyond the scope of direct examination but also did not tend to explain or qualify his previous testimony. The admissibility of this testimony cannot be supported by Rule 106. *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974); *United States v. Marin*, 669 F.2d 73 (2d Cir. 1982) ("completeness doctrine does not require introduction of portions of statement that are neither explanatory of or relevant to the admitted parts").

It is also fundamental that a party must positively invoke Rule 106 in a timely fashion or it is waived. *Hill v. Nelson*, 676 F.2d 1371 (11th Cir. 1986); *United States v. Larranga*, 787 F.2d 489 (10th Cir. 1986); *Murphy v. City of Flagler Beach*, 761 F.2d 622 (11th Cir. 1985); *United States v. Soulard*, 730 F.2d 1292 (7th Cir. 1984); *United States v. Winkle*, 587 F.2d 705 (5th Cir. 1979), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). Specifically, Rainey would first have to be qualified as as expert on the operation of the Pratt fuel control unit and engine. His opinion expressed in the letter

or on the stand would then be admissible. Rainey could not have been too concerned over the exclusion of this evidence because absolutely no effort was made to offer the letter, qualify Rainey as an expert, make an offer of his testimony, or recall him on plaintiffs' case in rebutttal and at that point qualify him and elicit his expert opinion.

No doubt the Eleventh Circuit *en banc* was embroiled in a divisive debate resulting in the six-six deadlock on the admissibility of evaluative conclusions. However, it simply cannot be believed that the Eleventh Circuit foresaw or intended this result. If the reasoning of the court is allowed to stand, then enterprising counsel, under the guise of the rule of completeness (Rule 106), could admit otherwise inadmissible opinion evidence. This is a clear departure from the accepted and usual course of judicial proceedings.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personnel Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

Sept. 22, 1987.

Appeals from the United States District Court for the Northern District of Florida.

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK, EDMONDSON, Circuit Judges.

PER CURIAM:

This case was taken *en banc* for the purpose of reconsidering controlling authority in this Circuit concerning

the admissibility in evidence of an opinion expressed in an investigative report of an airplane crash. The Court is evenly divided on the issue, however, so that the controlling authority remains as set forth in the panel decision. Since the Court is unanimous in upholding the panel's decision on the other evidentiary issue which requires a reversal for a new trial, the effect of this *en banc* procedure is to reinstate the panel opinion. *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523 (11th Cir. 1986). This opinion will simply review the case and the effect of this decision.

Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign Donald Bruce Knowlton died on July 13, 1982 in a fiery airplane crash while practicing landings and takeoffs at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla. Stat. Ann § 768.16-.27 in district court. The jury returned a verdict against the plaintiffs.

At trial, the only disputed issue was the cause of the fatal crash. Lieutenant Colonel David I. Habermacher, Jr., with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander William C. Morgan, Jr. to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Because no evidence was introduced to show that the report lacked trustworthiness, the factual findings contained in the report are admissible under Rule 803(8). *Rainey,* 784 F.2d at 1527. In his report, however, Morgan

also gave his opinion that pilot error was "[t]he most probable cause of the accident." *Id.* at 1526.

Rainey and Knowlton disagreed with Lieutenant Commander Morgan's opinion. In a letter written to Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight.

Because the two people in the plane were killed and the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants offered into evidence the opinion contained in the investigative report prepared by Lieutenant Commander Morgan.

Two points are raised on appeal. *First,* plaintiffs contend that John Charles Rainey's testimony was unduly restricted on cross-examination by his own attorney about his letter to Morgan after counsel for Beech Aircraft Corporation had called Rainey as an adverse witness. The panel opinion fully sets forth the circumstances concerning this issue and concludes the district court should be reversed for two reasons: (1) Fed.R.Evid. 106 requires the court to let Rainey testify as to the whole letter and, (2) the testimony was admissible under Fed.R.Evid. 801(d)(1)(B). *Rainey,* 784 F.2d 1528-30. The Court is unanimous in concluding that the panel opinion is correct in reasoning and result, so no further discussion of the issue is in order here.

Second, Rainey and Knowlton appeal the district court's decision to admit into evidence, over their objection, the opinion as to cause of the accident in the investigative report prepared by Lieutenant Commander Morgan. Morgan did not testify at the trial. The panel held that prior precedent of this Court, found in *Smith v. Ithaca Corp.,* 612 F.2d 215 (5th Cir. 1980), requires that the district court be reversed on this point. *Rainey,* 784 F.2d at 1527-28. *Smith* holds that "evaluative conclusions and opinions," such as those contained in Lieutenant Commander Morgan's report, are not admissible. 612 F.2d at 221-22. The Eleventh Circuit, in *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. Judge Johnson specially concurred in the panel opinion, noting that although *Smith* controlled the panel decision, it should be reconsidered *en banc. Rainey,* 784 F.2d at 1530.

Although this case was taken *en banc* for the purpose of reconsidering the evidentiary issue decided in *Smith,* the Court is evenly divided on the point. Judges Roney, Godbold, Hill, Fay, Vance and Clark would all adhere to *Smith.* Judges Tjoflat, Kravitch, Johnson, Hatchett, Anderson and Edmondson would follow the reasoning suggested in Judge Johnson's concurring opinion and overrule *Smith.*

Since the Court is evenly divided, there is no useful purpose in the publication of opinions setting forth the reasoning of either view. All judges agree that unless *Smith* is changed by the *en banc* court, it controls the issue in the district court. Since it takes a majority of the *en banc* court to change a prior precedent of this Court, *Smith* controls and the panel opinion properly decides the issue.

REVERSED and REMANDED.

TJOFLAT, Circuit Judge, specially concurring:

I concur in the en banc court's judgment in this case, reversing the district court because it improperly restricted the cross-examination of John Charles Rainey. The second issue in this case is whether the evaluative conclusions contained in Lieutenant Commander (LCDR) Morgan's investigative report are admissible under Fed.R.Evid. 803(8)(C).[1] I write separetely to urge the court to take its place among the majority of our sister circuits, favoring broad admissibility under Rule 803(8)(C)'s "factual findings" standard. Were we to adopt the majority view, I submit that we would hold that the district court in this case properly admitted the evaluative conclusions contained in the investigative report.

I.

On July 13, 1982, LCDR Barbara Ann Rainey, a flight instructor with the United States Navy, and her student, Ensign (ENS) Donald Bruce Knowlton, died in a fiery airplane

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[1] Fed.R.Evid. 803(8)(C) provides as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

crash while practicing "touch and go" landings and takeoffs[2] at Middleton Field in Alabama. The day after the crash, Lieutenant Colonel (LCOL) Habermacher of the United States Marine Corps, the Commanding Officer of LCDR Rainey's training squadron, under authority of the Manual of the Judge Advocate General § 0902, at 9-3 to 9-5, appointed LCDR William C. Morgan, Jr. to investigate the aircraft accident.[3]

[2] A "touch and go" pattern is a training exercise in which after takeoff, the student circles the airfield in an oval pattern and then lands the aircraft; after landing, the student does not stop the plane but instead accelerates and takes off again.

[3] The letter appointing LCDR Morgan to investigate the crash reads, in full, as follows:

> From: Commanding Officer, Training Squadron THREE
>
> To: LCDR William C. MORGAN, Jr., USN, 1310
>
> Subj: Investigation to Inquire into the Circumstances Connected with the Aircraft Accident which occurred at approximately 1020, 13 July 1982, approximately two miles southeast of Middleton Airport in Evergreen, Alabama.
>
> Ref: (a) JAG Manual Chapter VI and Section 0902, Chapter IX
>
> 1. You are appointed to conduct an informal investigation in accordance with reference (a), as soon hereafter as practicable, for the purpose of inquiring into all circumstances surrounding the aforementioned accident.
>
> 2. You will conduct a thorough investigation into all the circumstances surronding [sic] the accident and report your findings of fact, opinions and recommendations as to the following:
>
> a. The cause of the accident.
>
> b. The possibility of administrative or disciplinary action.
>
> c. Any claims for or against the U.S. Navy resulting therefrom.
>
> d. Be advised that no statement taken by you need be subscribed under oath.

On September 1, 1982, LCDR Morgan, pursuant to the requirements established by the Judge Advocate General, filed a written report with LCOL Habermacher. Accompanying LCDR Morgan's investigative report were sixty documents, termed "enclosures," consisting of 159 pages. The enclosures included the following documents: summaries of LCDR Rainey's naval flight and medical records and of Ensign Knowlton's aviation and medical records; Training Squadron Three's flight schedule for July 13, 1982; history and inspection records, including an outstanding maintenance action form, of the aircraft that crashed; air traffic control records; statements from the other instructors and students who were engaged in the "touch and go" exercise, as well as statements from other witnesses to the crash; crash crew rescue reports; aerial photographs of the crash site; casualty reports; the engineering investigative report on the aircraft's engine; photographs of the plane's wreckage; statements from the spouses of the crash victims; diagram of the Middleton Field traffic pattern; and copies of the autopsy protocol and toxicology reports of LCDR Rainey and ENS Knowlton. Based

> 3. By copy of this appointing letter, the squadron Administrative Department is directed to furnish you assistance in preparing the report of your investigation.
>
> 4. This report will be completed no later than 13 August 1982. If additional time is required, you will submit in writing to the Commanding Officer the reasons for and the amount of additional time required.
>
> /s/ D.I.HABERMACHER, JR.

On August 12, 1982, LCDR Morgan "requested that the due date for the informal investigation directed by reference (a) be extended for 14 days subsequent to the receipt of the autopsy protocol and toxicology reports and the results of the engineering investigation." On August 13, 1982, LCOL Habermacher approved LCDR Morgan's request.

on the sixty enclosures and on his investigation, LCDR Morgan prepared a six-page summary, including a preliminary statement, findings of fact, opinions, and recommendations. That summary is reproduced here in full:

PRELIMINARY STATEMENT

1. As directed by enclosure (1) and in accordance with reference (a), an informal investigation was conducted into the circumstances surrounding the aircraft accident which occurrred Southeast of Middleton Airport near Evergreen, Alabama, on 13 July 1982.

2. All reasonably obtainable evidence has been compiled and examined during the course of the investigation and all directives of the convening authority have been met. Certain real evidence collected by the Aircraft Accident Board was also obtained, however, considerable care was taken to ensure a separate and accurate investigation.

3. All claims and potential claims for damages by landowners have been investigated. The original claim of Mr. William W. Ward has been hand carried to Naval Legal Service, Pensacola, Florida. No estimates were required with this claim based on a phone conversation with LCDR G.F. Indest of the Naval Legal Service in Pensacola, Florida. The other property owner involved, Mr. Roger Warrick of Gauiter, Mississippi, has been notified of the accident and furnished Standard Form 95 by registered mail.

4. Several witnesses were found that heard the radio transmissions and saw the aircraft just prior to the crash. They all seemed rational and observant. Witnesses interviewed were not designated as parties to the investigation and all were advised of the nature of the JAG investigation.

5. The unusual length of time required to complete this investigation was due to the delay in receiving the autopsy reports on the two pilots and the delay in receiving the engineering investigation on the engine of aircraft 3E955. Additional delays were due to the research required to validate points brought out in the engineering investigation.

FINDING OF FACT

1. At approximately 1020 local on 13 July 1982, a U.S. Navy T-34C aircraft, bureau number 160955, piloted by LCDR Barbara A. Rainey crashed approximately two miles Southeast of Middleton Airport near Evergreen, Alabama, (enclosure (3)).

2. LCDR Barbara A. Rainey, 558-72-0652, USNR, reported to Training Squadron THREE on 16 November 1981, (enclosure (4)). At the time of the accident LCDR Rainey was fully NATOPS qualified (Naval Air Training and Operation Procedures Standardization Program) and Instrument qualified (enclosure (5)) as well as being a qualified familiarization instructor, (enclosure (6)). As of 12 July 1982, LCDR Rainey had accumulated 1331 total flight hours of which 209 were logged in the T-34C aircraft. LCDR Rainey had logged 96.2 hours during the 90 days preceeding [sic] the accident, (enclosure (7)). LCDR Rainey's Aviator's Log Book indicated no record of previous accidents or flight violations, (enclosure (8)).

3. ENS Donald B. Knowlton, 548-04-6268, USNR, was on active duty and checked into Training Squadron THREE on 24 May 1982 for duty as a Student Naval Aviator, (enclosure (9)). He had an average flight grade of 2.94 and had accumulated 4.5 hours in the T-34C aircraft, (enclosure (10)).

4. LCDR Rainey was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (11)).

5. ENS Knowlton was physically qualified for flight duty and was in a flight status on 13 July 1982, (enclosure (12)).

6. LCDR Rainey and ENS Knowlton were scheduled to fly Familiarization Flight Four at 0645 on 13 July 1982 by Training Squadron THREE's flight schedule authorizing the flight, (enclosure (13)).

7. Aircraft 160955, a T-34C, was accepted by the Navy on 26 September 1978. Inspection of the aircraft records, history, and logs revealed that all required maintenance inspections and technical directives had been complied with, (enclosure (14)). There was one outstanding discrepancy, the air-conditioning ground blower door spring was broken (enclosure (15)).

8. Aircraft Technical Directive No. T-34C-017 which was designed to provide a manual back-up system for fuel metering, (enclosure (16)), was not installed, (enclosure (14)). Although much has been written about the need for a manual fuel control, (enclosures (17), (18), (19), (20) and (21)), it is still not installed in the T-34C aircraft, (enclosure (14)).

9. LCDR Rainey and ENS Knowlton were issued aircraft 160955 and LCDR Rainey signed the acceptance sheet thereby assuming the responsibility of pilot in command, (enclosure (22)).

10. Review of North Whiting Tower traffic control strips for 13 July 1982 show the aircraft 160955 (3E955) departed North Whiting Field at 0915 local under VFR conditions, (enclosure (23)).

11. The weather observed indicated no conditions that would have a direct effect on the flight, (enclosure (24).

Weather in the Middleton pattern was excellent with no clouds, visibility 5 miles or more, and winds light and from the south, (enclosures (25), (26), (27) and (28)).

12. At approximately 1001, 3E955 entered the pattern at Middleton Field for Runway 18. At least four approaches were flown with a minimum of two "touch and go's" completed prior to the accident, (enclosure (28)).

13. At approximately 1020, while turning crosswind without proper interval, 3E955 crashed, immediately caught fire and burned, (enclosures (25), (27), (29), (30), (31) and (32)).

14. Upon receiving notification of a crash and seeing smoke to the southeast of Middleton Field, the crash crew immediately began transit to the crash site, (enclosures (27), (28) and (29)).

15. The [wreckage] of 3E955 crashed into a farmer's field of cutover timber with scattered trees in the area. The area has slightly rolling hills with a small dirt road passing near the crash site, (enclosure (41)).

16. 3E955 crashed on property owned by Mr. Roger Warrick. Transit to the crash site required that the crash crew and other vehicles cross property owned by Mr. Willliam W. Ward, (enclosure (42)).

17. During transit to the crash site, the crash crew had difficulty in locating the [wreckage] due to the muddy road conditions and the circuitous route required to go around a small stream and follen [sic] trees. Additionally, there were no current, detailed maps of the local area available to the crash crew. 3E467, piloted by LCDR Richard E. Blake, was over the crash site and assumed on scene command and attempted to direct the crash crew to the [wreckage], (enclosures (27), (28), (31) and (33)).

18. ABH1 R.S. Scribner stated that at approximately 1022 local, he stopped the crash truck and picked up a civilian who assisted in locating the [wreckage] of 3E955, (enclosure (28)).

19. LT Ted J. Choley stated that at appproximately 1030 local, he received a call from LT Will Carpenter on base radio stating that there was an accident at Middleton Field, (enclosure (36)).

20. At 1035 local, North Whiting Field operations was notified of a possible aircraft accident near Middleton Field, (enclosure (37)).

21. Upon arrival at the [wreckage] at 1040 local, the crash crew immediately began efforts to extinguish the fire using AFFF (lite water) and attempted to locate survivors. No response was heard to ABH1 Scribner's call to crewmembers of the aircraft. The burned bodies of both pilots were noted at this time, (enclosures (27), (28), (34) and (35)).

22. When all the AFFF (lite water) on the truck was depleted, the crash crew used all of the portable fire extinguishers on the truck in an attempt to put out the fire. When this failed, they resorted to shoveling dirt on the fire in an attempt to smother it, (enclosures (27), (28), (31), (34) and (35)). At 1042 local, all fires were extinguished with the exception of a magnesium fire which the crash crew was unable to put out, (enclosure (38)).

23. LCDR Rainey sustained a lethal neck injury at impact but bodily functions continued for an undetermined period, (enclosures (52) and (55)).

24. ENS Knowlton was killed instantly due to massive head injuries sustained at impact. (enclosures (52) and (56)).

25. At some undetermined point in the crash sequence, the rotary buckle holding the shoulder straps of the from [sic] cockpit harness failed, (enclosure (50)).

26. At some point during the flight or the subsequent crash, a LPA (life preserver assembly) inflation lever was moved to the activated position, (enclosure (51)).

27. At the time of impact, the engine of 3E955 was operating but was operating at reduced power, (enclosure (48)).

28. At 1050 local, HT-18 launched aircraft 171 as a SAR (search and rescue) mission to Middleton Field, (enclosure (39)). The aircraft arrived at the crash site at 1125 local and assumed on scene command from 3E467. 3E467 was relieved from communications relay duties at 1130 local, (enclosure (33)).

29. Upon landing at the site, the crew of aircraft 171 was informed that there were no survivors, (enclosures (43), (44) and (45)).

30. At 1050 local, HC-16 was notified by phone of an aircraft accident near Middleton Field. At 1105 local, a UH-1N launched and proceeded to the crash site, arriving there at 1150 local. Upon landing, HC-16 was requested to transport the bodies of the victims to NARMC (Naval Aerospace Regional Medical Center). The remains of the pilots were removed from the [wreckage] placed in body bags, and moved to the helicopter. Takeoff from the crash site was at 1430 local, and arrival at NARMC was at 1515 local. The remains were taken from the helicopter and placed in an ambulance for transportation to the hospital, (enclosure (40)).

31. An Engineering Investigation was conducted on the

engine of aircraft 160955 by the Naval Air Rework Facility, NAS Pensacola, Florida. (enclosure (48)).

OPINIONS

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

5. Because both pilots were killed in the crash and because of the nearly total destruction of the aircraft by fire, it is almost impossible to determine exactly what happened to Navy 3E955 from the time it left the runway on its last touch and go until it impacted the ground. However, from evidence available and the information gained from eyewitnesses, a possible scenario can be constructed as follows:

a. 3E955 entered the Middleton pattern with ENS Knowlton at the controls attempting to make normal landings.

b. After two unsuccessful attempts, LCDR Rainey took the aircraft and demonstrated two landings "on the numbers". After getting the aircraft safely airborne from the touch and go, LCDR Rainey transferred control to ENS Knowlton.

c. Due to his physical strength, ENS Knowlton did not trim down elevator as the aircraft accelerated toward 100 knots; in fact, due to his inexperience, he may have trimmed incorrectly, putting in more up elevator.

d. As ENS Knowlton was climbing to pattern altitude, he did not see the aircraft established on downwind so he began his crosswind turn. Due to ENS Knowlton's large size, LCDR Rainey was unable to see the conflicting traffic.

e. Hearing the first call, LCDR Rainey probably cautioned ENS Knowlton to check for traffic. Hearing the second call, she took immediate action and told ENS Knowlton she had the aircraft as she initiated a turn toward an upwind heading.

f. As the aircraft was rolling from a climbing left turn to a climbing right turn, ENS Knowlton released the stick letting the up elevator trim take effect causing the nose of the aircraft to pitch abruptly up.

g. The large angle of bank used trying to maneuver for aircraft separation coupled with the abrupt pitch up caused the aircraft to stall. As the aircraft stalled and went into a nose low attitude, LCDR Rainey reduced the PCL (power control lever) toward idle. As she was rolling toward wings level, she advanced the PCL to maximum to stop the loss of altitude but due to the 2 to 4 second lag in engine response, the aircraft impacted the ground before power was available.

6. Although the above sequence of events is the most likely to have occurred, it does not change the possibility that a "rollback" did occur.

7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval [between LCDR Rainey's airfraft and another aircraft in the pattern].

8. There are many items that are considered as possible contributing factors to the accident. They are listed as follows:

a. The design of the aircraft which limits forward visability [sic] when in a climb.

b. The performance of the engine from idle to max power and the associated lag.

c. The relative size of the individuals, ENS Knowlton's size and strength could enable him to overpower LCDR Rainey in a panic situation.

d. The possibility that an LPA (life preserver assemby) was inflated at a critical time.

e. The inability of early stage students to trim correctly.

9. The Middleton Crash Crew and the RDO (Runway Duty Officer) acted in a very professional manner.

RECOMMENDATIONS

1. That the claim of Mr.William W. Ward be honored.

2. That a flight for the NATOPS syllabus be designed to familiarize all pilots with the different type stalls that may be encountered.

3. That landing lights be used in the landing pattern to enhance visibility of aircraft established downwind.

4. That every effort be made to incorporate Aircraft Technical Directive No. T-34C-0147 at the earliest possible date.

/s/ W.C. Morgan, Jr.

In letters to the Judge Advocate General of the United States Navy, the following officers endorsed LCDR Morgan's investigative report: the Commanding Officer of Training Squadron Three (LCOL Habermacher), the Commanding Officer of Training Squadron Five, the Chief of Naval Education and Training, and the Chief of Naval Operations. In addition, two other officers sent endorsement letters to LCOL Habermacher. Although a few endorsers took issue with some of LCDR Morgan's recommendations, none disagreed with any of his opinions that were admitted into evidence.

Disagreeing with LCDR Morgan's opinion that pilot error was "[t]he most probable cause of the accident," the spouses of the crash victims, John Charles Rainey and Rondi M. Knowlton, filed separate suits on April 15, 1983 in the district court against the manufacturer of the aircraft, Beech Aircraft Corporation, the manufactuer of the aircraft's engine, Pratt & Whitney Canada, Inc., and the Navy's contract maintenance service for the aircraft, Beech Aerospace Services, Inc.[4] Each plaintiff alleged negligence and strict product liability causes of action and sought money damages under the Florida Wrongful Death Act, Fla.Stat. §§ 768.16-.27 (1985). Specifically, Rainey and Knowlton each alleged that "[t]he aircraft and engine were equipped with a pneumatic fuel control system which was defective in its design and/or manufacture in that it was prone to malfunction in such [a] way as to cause 'power interruptions' . . . such that the pilot of the subject aircraft was unable to sustain sufficient power to maintain flight." The spouses alleged that Beech Aircraft

[4] Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton brought suit individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton.

and Pratt & Whitney were negligent in designing and manufacturing the aircraft and engine in that they knew or should have known of the defects; they alleged that Beech Aerospace Services, Inc. was negligent when it issued to LCDR Rainey an aircraft that it knew or should have known had a defective fuel control system. Both Rainey and Knowlton sought punitive damages against the defendants, contending that they acted "in reckless disregard for the safety of decedent and other persons who they knew would fly the aircraft." At a pretrial conference on March 20, 1984, the district court granted Beech Aircraft Corporation's motion to consolidate the two cases for all purposes, including trial.

During that same pretrial conference, the district court held that LCDR Morgan's investigative report was trustworthy and that his factual findings, but not his opinions or conclusions, would be admissible. On July 10, 1984, during a hearing held the day before trial, the district court reversed in part its prior ruling on the admissibility of LCDR Morgan's report. The court reiterated that "the defendants [could] place in evidence before the Jury the findings of facts, 31 in number, that were in the JAG report." The court further held "that the opinions attached to those 31 findings may also be admitted, to the extent that they are opinions and conclusions." According to the district court, however, not every "opinion" in LCDR Morgan's report was admissible under Fed.R.Evid. 803(8)(C):

> Paragraph five is nothing but a possible scenario, as it's called, and would not be allowed in. Paragraph eight talks about possible contributing factors and it would not be allowed in. Paragraph nine, which says somebody acted in a very professional manner, would not be allowed in because it is not relevant.

Accordingly, the district court held that paragraphs five, eight,

and nine of the report's "opinions" section would not be allowed into evidence at trial.[5]

The plaintiffs objected to the district court's new ruling on the admissibility of the JAG report, citing *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980).[6] In light of the court's ruling, the plaintiffs requested an opportunity to review the JAG report for the purpose of offering evidence and witnesses relating to LCDR Morgan's "Opinion" No. 7 (which appears to be based on "Finding of Fact" No. 13): "The most probable cause of the accident was the pilots [sic] failure to maintain proper interval." The district court granted the plaintiffs' request.

The only disputed issue at trial was the cause of the fatal crash. The parties relied heavily on opinions of expert witnesses. The defendants relied in part on excerpts from the opinions contained in LCDR Morgan's investigative report.[7]

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[5] *See infra* note 7.

[6] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[7] The trial exhibits are not part of the record on appeal. Although the court has before it a complete copy of LCDR Morgan's investigative report, which presumably was included in the record on appeal as an exhibit to a memorandum filed in support of a motion, I can only assume, as the parties agree, that the portions of the report that the district court on July 10, 1984 ruled would be admissible at trial were actually admitted into evidence. I therefore assume that all 31 of the report's findings of fact were admitted into evidence, along with all the report's opinions except paragraphs five, eight, and nine. (I also assume that the district court struck the opinion in paragraph six, which deals with the possibility that a "rollback" caused the accident, because that opinion can only be read along with paragraph five, which the district court explicitly held inadmissible during the July 10, 1984 pretrial conference.) Additionally, a colloquy between the trial judge and the parties' lawyers, outside the presence of the jury, indicates that the court also admitted into evidence the maintenance record of the plane that crashed; that record was attached to LCDR Morgan's report.

The following "opinions" from that report were admitted into evidence:

> 1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.
>
> 2. There is no factual evidence of command or supervisory error.
>
> 3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.
>
> 4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.
>
> . . . .
>
> 7. The most probable cause of the accident was the pilots [sic] failure to maintain proper interval.

On July 20, 1984, the jury returned a verdict for the defendants, finding that the deaths of LCDR Rainey and ENS Knowlton were not legally caused by the aircraft's fuel control system, and that there was no negligence on the part of Beech Aircraft, Pratt & Whitney, or Beech Aerospace that legally caused the deaths of LCDR Rainey and ENS Knowlton.

On August 1, 1984, the plaintiffs filed a motion for a new trial, challenging two of the trial judge's evidentiary rulings. The district court denied the motion, and this appeal followed.

A panel of this court reversed the district court, holding that the district court improperly restricted plaintiff Rainey's trial testimony and that it improperly admitted into evidence,

contrary to precedent of this court found in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), the opinions contained in LCDR Morgan's investigative report. We took the case en banc to consider both evidentiary issues, thereby vacating the panel's opinion and judgment by operation of law. *See* 11th Cir.R. 26(k). I write now to urge that the en banc court reject the holding of *Smith* and affirm the district court's ruling admitting into evidence the opinions contained in LCDR Morgan's investigative report.

II.

To be admissible, an investigative report of the sort prepared by LCDR Morgan must satisfy the hearsay exception for public records and reports found in Fed.R.Evid. 803(8)(C). That rule provides a hearsay exception for "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . in civil actions and proceedings . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8)(C). As to the rule's public record requirement, the en banc court holds that LCDR Morgan's investigative report is a public record: it was prepared in conjunction with an authorized Judge Advocate General investigation.

As to the rule's caveat that certain findings of a public record are admissible unless the sources of the information that lead to the findings or other circumstances indicate that such sources were untrustworthy, there is no evidence in the record that would indicate that the sources upon which LCDR Morgan relied lacked trustworthiness. The burden was on the plaintiffs to show that the report was inadmissible if they believed that its sources of information or other circumstances

indicated that the report lacked trustworthiness. *See* Fed.R. Evid. 803(8) advisory committee's note (Rule 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present"); *see also Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir.1975)). Although the plaintiffs knew months before trial that the defendants would seek to admit LCDR Morgan's investigative report into evidence, they neither attacked the qualifications of LCDR Morgan nor the methodology he employed. During the July 10, 1984 pretrial conference, the plaintiffs requested leave to review the report to determine whether to present evidence bearing on the trustworthiness of the report's opinions. The district court granted the plaintiffs' request, but they presented no evidence challenging the report's trustworthiness and did not seek a continuance to gather such evidence. The plaintiffs have not met their burden. For these reasons, this court cannot, and does not, set aside the district court's finding that the report is trustworthy.

The issue that divides us is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C) encompass evaluative conclusions derived from the report. The panel that heard this appeal answered in the negative, concluding that it was bound by the former Fifth Circuit's interpretation of "factual findings" in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980). *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1527-28 (11th Cir. 1986) (per curiam). In a separate concurring opinion, Judge Johnson described *Smith* as "an anomaly among the circuits" and urged the en banc court to reject the *Smith* court's reasoning and to adopt a rule favoring broad admissibility of evaluative conclusions contained in investigative reports that are trustworthy public records and are relevant to the issues in question. *See id.* at 1530 (Johnson, J., concurring specially). I agree with Judge Johnson.

III.

In *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir.1980), the former Fifth Circuit considered the admisssibility under Fed. R.Evid. 803(8)(C) of excerpts from a Coast Guard Marine Board of Investigation Report. Acknowledging that the legislative history of the rule does not unambiguously resolve the issue and that the federal courts have disagreed over the appropriate interpretation of "factual findings," the *Smith* court reached this conclusion:

> [T]he language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the records of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "actual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is logical to assume that Congress intended that the terms have different and distinct meanings.

Id. at 221-22 (citing *Complaint of Am. Export Lines, Inc.*, 73 F.R.D. 454, 457 (S.D.N.Y.1977)). [8] Accordingly, the *Smith*

[8] Fed.R.Evid. 803(6) provides as follows:

> **Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> **(6) Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a

court held that "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. In my view, the *Smith* court misinterpreted "factual findings" within the meaning of Rule 803(8)(C), unduly limiting the rule's scope.

A.

A literal reading of Rule 803(8)(C) hardly lends itself to a restrictive interpretation. The rule creates a hearsay exception for trustworthy public reports "setting forth . . . factual findings resulting from an investigation." Fairly read, the rule admits not merely "factual findings," but reports in their entirety, as long as the reports are trustworthy and contain factual findings. After all, this hearsay exception is entitled "public records and reports," not "factual findings set forth in public records." *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1143 (E.D.Pa. 1980) ("The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, *inter alia*, factual findings. . . ."), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

The Advisory Committee Notes support this reading of the rule. The Committee couched its discussion in terms of the

person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

admissibility of evaluative reports.[9] Although the Committee understood that the rule "assumes admissibility in the first instance," it believed that the rule provides "ample provision for escape if sufficient negative factors are present." Fed. R.Evid. 803 advisory committee's note. The Committee offered a nonexclusive list of "[f]actors which may be of assistance in passing upon the admissibility of evaluative reports":

> (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, *id.*, (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir.1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).

Fed.R.Evid. 803 advisory committee's note. Notably, the Committee did not even mention the possibility that admissibility would be limited to those portions of evaluative reports that present "factual findings."

The House Judiciary Committee "approved Rule 803(8) without substantive change from the form in which it was submitted by the [Supreme] Court." Report of the Committee on the Judiciary, H.R.Rep. No. 650, 93d Cong., 1st Sess. 14 (1973), *reprinted in* 1974 U.S.Code Cong. & Admin.News 7051, 7075, 7088. The Committee, however, adopted a somewhat tortured reading of the public records hearsay exception: "The Committee intends that the phrase 'factual find-

[9] Evaluative reports under Rule 803(8)(C) "are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case." Fed.R.Evid. 803 advisory committee's note.

ings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule." *Id.* That reading is tortured not only because it erroneously focuses on the admissibility of factual findings contained in public reports, rather than on, as the Rule says, public records "setting forth . . . factual findings resulting from an investigation," but also because it contorted the meaning of "factual findings."

A "finding" is "[a] decision upon a question of fact reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc." Black's Law Dictionary 569 (5th ed.1979). That is, a finding "commonly applies to the result reached by a judge or jury." *Id.* In other words, a "finding" or a "finding of fact" refers to the result or conclusion drawn by an investigator, whether it be a fire inspector, judge, or jury, "from facts without exercise of legal judgment." *Id.* The common meaning of finding therefore comports with investigative conclusions (i.e., results derived from the examination of facts), but not with idle speculation or legal conclusions: "a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence, 569 (5th ed. 1979). That is, a finding "commonly applies to any statement of fact that represents a conclusion on the part of an investigator." *Zenith Radio Corp.*, 505 F.Supp. at 1144 (footnote omitted). Thus, by way of example, the following investigative (or evaluative) conclusions are "factual findings": whether a traffic light was green or red (there were no eyewitnesses) moments before an automobile accident, *see Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir.1978), *cert. denied,* 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); whether a public school board had established and maintained an elementary school as a black school for segregative purposes, *see United States v. School*

Dist. of Ferndale, 577 F.2d 1339, 1354-55 (6th Cir.1978); whether a state trooper who fatally shot a man who attacked him acted within the guidelines of the department's of Policies and Procedures Manual, *see Ferrin v. Anderson,* 784 F.2d 1040, 1046-47 (10th Cir.1986); whether a state trooper acted contrary to department training when he attempted to handcuff a person while holding a cocked weapon, *see Wilson v. Beebe,* 770 F.2d 578, 589-90 (6th Cir.1985) (en banc); whether a crewmember of a ship started a fight, *see Lloyd v. American Export Lines, Inc.,* 580 F.2d 1179, 1182-83 (3d Cir.), *cert. denied,* 439 U.S. 969, 99 S.Ct. 461, 58 L.Ed.2d 428 (1978); whether the captain of a tow boat acted reasonably in mooring the vessel and setting the watch, *see In re Paducah Towing Co.,* 692 F.2d 412, 419-21 (6th Cir. 1982); whether there is a statistically significant link between tampon use and toxic shock syndrome, *see Ellis v. International Playtex, Inc.,* 745 F.2d 292, 299-304 (4th Cir.1984); and whether a phone company's tariffs were unreasonable and discriminatory, *see Litton Systems, Inc. v. AT & T,* 700 F.2d 785, 819 (2d Cir.1983), *cert. denied,* 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984).

The Senate Judiciary Committee rejected the House Committee's narrow interpretaion of "factual findings," opting instead for the Advisory Committee's view:

> The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory

Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

***

> The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish[es] sufficient guidance on the admissibility of evaluative reports.

Report of the Committee on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess. 18, *reprinted in* 1974 U.S. Code Cong. & Admin.News 7051, 7064-65.[10]

[10]The Senate and House versions of Rule 803(8) differed slightly. The Senate version referred to another proposed rule, relating to the admissibility of certain criminal law enforcement records and reports. That reference was deleted by the Conference Committee, which adopted the House's version of the rule. *See* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* 803-23 (1985); *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 n. 6 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

The Conference Committee did not resolve the differing views of the term "factual findings." The Conference Commitee Notes make no reference to the scope of Rule 803(8) or to the meaning of "factual findings." *See Notes of Conference Committee*, H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin.News 7098; *see also Baker v. Elcona Homes Corp.*, 588 F.2d 551, 557 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979).

The legislative history as to the admissibility of evaluative conclusions is indeed equivocal. Nevertheless, the Senate's view is more consistent with the other hearsay exceptions and with the general spirit of the Federal Rules of Evidence, and is more easily justified on policy grounds. *See United States v. AT & T.* 498 F.Supp. 353, 359 (D.D.C.1980) ("Extrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position.").

Rule 803(6), the regular entries rule, creates a hearsay exception for reports or records "of acts, events, conditions, opinions, or diagnoses . . . if kept in the course of a regularly conducted business activity . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Fed.R.Evid. 803(6). Because Rule 803(6) uses the terms "opinions" and "diagnoses," whereas Rule 803(8)(C) uses the term "factual findings," the *Smith* court inferred that Congress must have intended that those terms have distinct meanings and, more specifically, that "factual findings" not encompass evaluative conclusions. *See Smith v. Ithaca Corp.*, 612 F.2d 215, 221-22 (5th Cir. 1980). The *Smith* court reached this erroneous result, I believe, because it apparently gave no credence to the Advisory Committee's Note on Rule 803(6).

Tracing the origins of the regular entries rule, the Advisory Committee noted that "[e]ntries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results." Fed.R.Evid. 803 advisory committee's note. The Committee acknowledged, however, that the Commonwealth Fund Act, 28 U.S.C. § 1732, the Uniform Business Records as Evidence Act, Model Code Rule 514, and Uniform Rule 63(13) contained limiting and ambiguous language with respect to diagnoses, test results, and opinions. Thus, according to the Advisory Committee, "[i]n order to make clear its adherence to the [trend toward freely admitting diagnostic entries,] the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries." Fed.R.Evid. 803 advisory committee's note.[11]

Given this account of why the regular entries rule makes explicit reference to diagnoses and opinions, it strikes me as absurd to cite the language of that rule as support for an argument limiting the scope of "factual findings" within the meaning of the public records rule. The reason that the regular entries rule specifically mentions" diagnoses" and"opinions" has nothing whatsoever to do with why Rule 803(8) employs the term "factual findings." If anything, attributing a severely restricted significance to the phrase "factual findings" would be inconsistent with the regular entries rule: "No legislative history points to any intent on the part of Congress to limit

[11] The House Committee Notes, the Senate Committee Notes, and the Conference Committee Notes do not discuss the significance of Rule 803(6)'s use of the terms "opinions" and "diagnoses" or how the scope of those terms differs from the scope of "factual findings," as used in Rule 803(8)(C).

the public records exception [Rule 803(8)] so as to exclude records which had previously qualified for admission pursuant to the business entries exception [Rule 803(6)]. 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8) [03] (1985) (citation omitted).

In addition, "[b]road admissibility [under Rule 803(8)(C)] releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir.1986) (Johnson, J., concurring specially); *see also* Fed.R.Evid. 704(a) ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier-of-fact."). Thus, consistent with the basic approach that opinions should be admitted when helpful to the trier of fact, *see* Fed.R.Evid. 704 advisory committee's note, trustworthy and relevant evaluative opinions should be admitted under the public records exception of Rule 803(8)(C), as long as jurors can ascertain the significant facts that form the basis of the opinion. *See* 4 J. Weinstein & M. Berger, *supra*, ¶ 803(8) [03].

B.

Broad admissibility of public records containing evaluative conclusions (i.e., normative judgments drawn from the analysis of facts) is good policy because these reports are presumptively reliable. Rule 803(8)(C) is premised on "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." Fed.R.Evid. 803 advisory committee's note (citing *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952)).Admission of public records can be justified 'by the

probability that the officals conducting the investigation (who themselves are under a public duty) will be careful and discriminating in selecting the factual data upon which to rely in reaching their findings and conclusions." G. Lilly, *An Introduction to the Law of Evidence* 245 (1978). Most investigators under a public duty lack a motive to distort the facts or their conclusions. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir.1984); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *see also Melville v. American Home Assurance Co.*, 443 F.Supp. 1064, 1112 (E.D.Pa.1977). ("[P]ublic records or reports, by virtue of their being based on legal duty and authority, contain sufficient circumstantial guarantees of trustworthiness to justify their use at trial."), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir. 1978).

Dean McCormick offered several other reasons for allowing a trier of fact to receive an investigative report — including the investigator's conclusions based on the facts he has gathered — as evidence:

> The most important reason is time. The officer comes on the scene usually as early as it is feasible to get there. Usually the investigators of the parties come later and the statements are frequently partial and one-sided. The witnesses at the trial have often only a dim recollection of the event, and their testimony rests mostly on their pre-trial refreshment of memory by these statements. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist — a doctor reporting death, a fire marshall investigating a fire — or at least experienced in like investigations, such as a highway patrolman reporting on a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363(1957). Because the source of these public reports — an investigator operating under authority of law — is presumptively reliable, "there is no reason not to admit the feelings simply because they tend towards the conclusory rather than the actual endd." *United States v. AT&T*. 498 F.Supp 353 360 (D.D.C. 1980); see also Zenith Radio Corp. v. Matshushita Elec. Indus. Co., 505 F.Supp. 1125, 1144 (E.D.Pa, 1980) ("[F]actual statements need not be formally termed 'findings' in order to come in under 803(8)(C)."). *aff'd in relevant part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 583 (1986).

The presumption that evalutative reports of this sort are trustworthy is, of course, rebuttable. Not every public report made pursuant to an investigation authorized by law that contains factual findings will be admissible. Rule 803(8)(C) allows for the admission of evaluative reports "unless the sources of information or other circumstances indicate lack trustworthiness." Fed.R.Evid. 803(8)(C). In other words, "if sufficient negative factors are present" to indicate that the report is not trustworthy, then it should not be admitted. *See* Fed. R.Evid. 803(8) advisory committee's note. "The factors that may be used to determine admissibility include: (1) the timeliness of the investigation; (2) the special skill or experience of the official; and (3) possible motivation problems." *Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-01 (4th Cir.1984) (citing Fed.R.Evid. 803(8)(C) advisory commitee's note); *see also Perrin v. Anderson*, 784 F.2d 1040, 1047 (10th Cir.1986). The court's consideration of such negative factors provides an exclusionary mechanism sufficient to safeguard against the admission of unreliable evidence. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978).

The burden to demonstrate that an investigative report is not reliable is on the party opposing admission of the report. *Ellis*, 745 F.2d at 301 (citing *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618 (8th Cir.1983); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 558 (6th Cir.1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979)). As a practical matter, this makes a good deal of sense:

> Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of "re-inventing the wheel" each time a report is offered. Rather than requiring the moving party to spend considerable time and money to ensure that the experts who conducted the study are available at trial, it is far more equitable to place that burden on the party seeking to demonstrate why a time tested and carefully considered presumption is not appropriate.

Ellis, 745 F.2d at 301.

C.

Rule 803(8) must be viewed in conjunction with the other rules of evidence. Accordingly, the admissibility of Rule 803(8)(C) public records of an evaluative nature, which in most cases are prepared by experts, should be interpreted broadly so that Rule 803(8)(C) is consistent with Rule 703, which provides that facts forming the basis of an expert's opinion need not themselves be admissible as long as they are "of a type reasonably relied upon by experts in the particular field."

[12] Fed.R.Evid. 703 provides in full as follows:

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Fed.R.Evid. 703;[12] *see also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F.Supp. 1125, 1148 (E.D.Pa.1980), *aff'd in relevant part*, 723 F.2d 238 (3d Cir.1983), *rev'd on other grounds*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Furthermore, although public records are excepted from the hearsay evidence rule because they are presumed generally to be reliable, the reliability of a particular evaluative report can be tested not only with the trustworthiness inquiry called for by Rule 803(8)(C), but also with the objections permitted by Rules 702 and 705. *See Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Rule 702 allows objections to the qualifications of an expert witness,[13] and Rule 705 allows disclosure on cross-examination of facts and data underlying an expert's testimony.[14] Of course, an

[13] Fed.R.Evid. 702 provides as follows:

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[14] Fed.R.Evid. 705 provides as follows:

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

In *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978) (citation and footnote omitted), the Third Circuit noted the following:

> Before these objections [under Rules 702 and 705] may be recognized, however, the party challenging the validity of an official report admitted under 803(8)(C) must come for-

evaluative report admissible under Rule 803(8) may have to be excised in part under Rules 401 and 402, providing that irrelevant evidence is inadmissible,[15] and under rule 403, excluding relevant evidence on grounds of prejudice, confusion, or waste of time.[16]

In sum, "Rule 803(8) should be interpreted in accord with th[e] treatment of 'opinion' evidence. If the report states a conclusion that would be helpful — and is reliable — it should be admitted." 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8) [03] (1985) (footnote omitted). This determination is a matter to be left within the sound discretion of the district court. The court would thus be "free to say, pursuant to Rule 803(8)(C), 'in this particular case and in view of the shaky foundation for the conclusions, I will exclude the report unless you produce the reporting officer.'" *Id.* (quoting McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?* 42 Iowa L.Rev. 363, 369 (1957)). Another way the trial court can safeguard the rights of the party against whose interest the report is being introduced is to comment on the weight of the evidence, *id.*, and to issue an instruction cautioning the jurors against substituting the investigator's judgment for their own, *id.; see also In re Plywood Antitrust Litig.*, 655 F.2d 627, 637 (5th Cir. Unit A Sept.1981), *cert. dismissed*, 462 U.S. 1125, 103 S.Ct. 3100, 77L.Ed.2d 1358 (1983); *Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 n. 3 (W.D.Mo.1982).

ward with some evidence which would impugn its trustworthiness. To allow objections to be sustained under Rules 702 and 705 without a showing of untrustworthiness would have the practical effect of nullifying the exception to the hearsay rule provided by Rule 803(8)(C).

[15] Fed.R.Evid. 401 provides as follows:

Rule 401 — Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed.R.Evid. 402 provides as follows:

Rule 402 — Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[16] Fed.R.Evid. 403 provides as follows:

Rule 403 — Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

D.

Finally, I note that the weight of authority is against the reasoning of *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980). In 1976, the Supreme Court noted that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*. See Fed.Rule Evid. 803(8)(C)." *Chandler v. Roudebush*, 425 U.S. 840, 863 n. 39, 96 S.Ct. 1949, 1961 n. 39, 48 L.Ed.2d 416 (1976) (citation omitted). The *Smith* court made no reference to the Supreme Court's broad reading of Rule 803(8)(C). *See Cohen v. General Motors Corp.*, 534 F.Supp. 509, 512 (W.D.Mo.1982) ("[I]t appears that the Supreme Court has given a broad directive for liberal use of agency findings, somewhat at variance with Judge Wisdom's cautious approach in [*Smith*].").

As Judge Johnson has noted, "*Smith* is an anomally among the circuits. The majority view favors broad admissibility

under Rule 803(8)(C)'s 'factual findings' standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir.1984) ('[I]t is well established that the phrase should be interpreted broadly')." *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1530 (11th Cir.1986) (Johnson, J., concurring specially); *see also Perrin v. Anderson*, 784 F.2d 1040, 1046-47 (10th Cir.1986); *Kehm v. Procter & Gamble Mfg.*, 724 F.2d 613, 618-19 (8th Cir.1983); *Litton Systems, Inc. v. AT & T*, 700 F.2d 785, 819 (2d Cir.1983), *cert. denied*, 464 U.S. 1073, 104 S.Ct. 984, 79 L.Ed.2d 220 (1984); *Baker v. Elcona Homes Corp.*, 588 F.2d 551, 554-59 (6th Cir. 1978), *cert. denied*, 441 U.S. 933, 99 S.Ct. 2054, 60 L.Ed.2d 661 (1979); *Melville v American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir.1978). Even in the Fifth Circuit, *Smith* has not been uniformly followed. *See, e.g., Mac Towing Inc. v. American Commercial Lines*, 670 F.2d 543, 547 (5th Cir.1982) (district court properly admitted Coast Guard accident report that attributed blame in shipping case); *Local Union No. 59, Int'l Bhd. of Elec. Workers v. Namco Elec., Inc.*, 653 F.2d 143, 145 (5th Cir. Unit A Aug. 1981) (findings in NLRB investigative letter admissible under Rule 803(8)(C); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir.1980) ("The district judge was, indeed, in error in refusing to admit the investigative report and determination of the EEOC."), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). Additionally, courts that have considered the admissibility of JAG reports, similar to the one prepared by LCDR Morgan, under Rule 803(8)(C) have broadly interpreted "actual findings." *See, e.g., Walker v. Fairchild Indus.*, 554 F.Supp. 650, 653 (D.Nev. 1982); *Sage v. Rockwell In'tl Corp.*, 477 F.Supp. 1205, 1207-10 (D.N.H.1979); *Schoenborn v. Boeing Co.*, 586 F.Supp. 711, 725, 18 Av. Cas. (CCH) 18,335, 18,344-45 (E.D.Pa.1984).

IV.

A majority of this court agrees that LCDR Morgan's investigative report is a public record and that it is trustworthy for purposes of Rule 803(8)(C). The report is certainly of the sort that the rule contemplates as trustworthy: the report is thorough, as evidenced by the supporting documents totaling 159 pages, and LCDR Morgan's conclusions are credible, having been endorsed by six fellow officers of various ranks. Moreover, the district court gave the plaintiffs ample opportunity to challenge the trustworthiness of the report; nevertheless, the plaintiffs presented no evidence attacking the qualifications of LCDR Morgan or the methodology he employed.

The sole issue that evenly divides this court is whether "factual findings resulting from an investigation," Fed.R.Evid. 803(8)(C), encompass evaluative conclusions derived from the report. Based on the facts uncovered by his extensive investigation, LCDR Morgan reached several conclusions that the district court admitted into evidence. Finding that the "aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash" (Opinion No. 1), LCDR Morgan eliminated, in effect, a defect in the fuel control system as the cause of the accident. He concluded that based on his investigation there was no contributing command or supervisory error (Opinion No. 2). LCDR Morgan also found that neither LCDR Rainey nor ENS Knowlton had any physical or mental ailments that could have caused the crash (Opinion NO. 3). Having eliminated several other possible causes of the crash, and based on (1) the statements of the other instructors and students engaged in the "touch and go" exercise, (2) air traffic control records, and (3) an analysis of the traffic pattern diagram for Middleton Field, LCDR Morgan concluded that "[t]he most

probable cause of the accident was the pilots [sic] failure to maintain proper interval." (Opinion No. 7). In other words, in LCDR Morgan's professional judgment, pilot error caused the crash.

In my view, LCDR Morgan's conclusions that were admitted into evidence at trial are "factual findings" within the common sense meaning of that term and as contemplated by the Advisory Committee and the Senate Judiciary Committee. Moreover, consistent with the overall spirit of the Federal Rules of Evidence, LCDR Morgan's evaluative findings could certainly have been helpful to the jury.

For these reasons, the district court did not abuse its discretion when it admitted portions of LCDR Morgan's "opinions." I would nevertheless reverse the district court, concurring in the en banc court's judgment that the district court improperly restricted the cross-examination testimony of John Charles Rainey.

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Aircraft of Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

May 27, 1986.

Appeals from the United States District Court for the Northern District of Florida; Winston E. Arnow, Judge.

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion March 25, 1986, 11th Cir., 1986, 784 F.2d 1523)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active serving having requested a poll on the application for rehearing en banc and a majority of the judges in this Court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the above-consolidated causes shall be reheard by this Court en banc *without* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs. The previous panel's opinion is hereby VACATED.

John C. RAINEY, Individually and as Personal Representative of the Estate of Barbara A. Rainey, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Rondi M. KNOWLTON, Individually and as Personal Representative of the Estate of Donald Bruce Knowlton, Plaintiff-Appellant,

v.

BEECH AIRCRAFT CORPORATION, Beech Aerospace Services, Inc., and Pratt & Whitney Canada, Ltd., Defendants-Appellees.

Nos. 84-3625, 84-3626.

United States Court of Appeals,
Eleventh Circuit.

March 25, 1986.

Appeals from the United States District Court for the Northern District of Florida.

Before FAY and JOHNSON, Circuit Judges, and HOFFMAN*, District Judge.

*Honorable Walter E. Hoffman, U.S. District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

Barbara Ann Rainey and Donald Bruce Knowlton died on July 13, 1982 in a fiery plane crash at Middleton Field, Alabama. Their spouses, John Charles Rainey ("Rainey") and Rondi M. Knowlton ("Knowlton") sought money damages under the Florida Wrongful Death Act, Fla.Stat. § 768.16-.27 (1985), in district court.[1] The jury returned a verdict against Rainey and Knowlton. We hold that the trial judge committed reversible error in two evidentiary rulings and remand for a new trial.

I.

On July 13, 1982 Lieutenant Commander Barbara Ann Rainey, a flight instructor with the United States Navy, was issued a T-34C Turbo-Mentor aircraft, number 3E955, for a training exercise at Middleton Field, Alabama. Her student was Ensign Donald Bruce Knowlton. Ensign Knowlton was to practice "touch and go" landings and takeoffs.[2] There were five aircraft in the "touch and go" pattern.

Witnesses testified that Ensign Knowlton, after successfully completing four "touch and go" patterns, began

[1] Rainey brought suit individually, as the personal representative of his wife's estate, and on behalf of his minor children, Cynthia Ann Rainey and Katharine Marie Rainey. Knowlton sued individually, as the personal representative of her husband's estate, and on behalf of her minor children, Ramsey Nia Knowlton and Branigan McDermott Knowlton. By order dated March 20, 1984 the two cases were consolidated "for all purposes including consolidation for trial."

[2] A "touch and go" is a training exercise employed to familiarize students with takeoffs and landings. After takeoff, the student circles the airfield in an oval or racetrack pattern and then lands the aircraft. Upon landing, the student does not stop the craft, but accelerates to take off again.

"climbing out low; that is, below the standard altitude, and slow, slower than the 100 knots or 90 knots that the aircraft should have been at." Witnesses also testified that Ensign Knowlton made an early crosswind turn; this early turn prompted two radio transmissions. Captain Charles E. Guthrie, a flight instructor riding in another aircraft in the pattern, cautioned Lieutenant Commander Rainey:[3] "Aircraft turning crosswind, you're cutting somebody out." Similarly, Lieutenant Colonel David I. Habermacher, Jr., a flight instructor in the aircraft forced out of the pattern, transmitted the warning: "Aircraft turning crosswind, you're cutting us out. Heads up."

Lieutenant Commander Rainey did not verbally respond to these radio transmissions. Witnesses testified, however, that following these transmissions Lieutenant Commander Rainey's aircraft banked sharply to the right. While the threatened midair collision with Lieutenant Colonel Habermacher's aircraft was thus avoided, the aircraft piloted by Lieutenant Commander Rainey rapidly lost altitude, crashed in a wooded area two miles southeast of Middleton Field, and burned. Neither Lieutenant Commander Rainey nor Ensign Knowlton survived the crash.

On July 14, 1982 Lieutenant Colonel Habermacher directed Lieutenant Commander William C. Morgan, Jr. to conduct an informal investigation into the circumstances surrounding the crash. On September 1, 1982 Lieutenant Commander Morgan reported, in writing, his findings of fact, opinions and recommendations pursuant

[3] It is, of course, impossible to determine whether Lieutenant Commander Rainey or Ensign Knowlton was in control of the aircraft at this time. Witnesses knowledgeable in flight instruction, however, testified that Lieutenant Commander Rainey, a trained pilot and flight instructor, would, under these circumstances, assume control over the aircraft.

to the requirements established by the Judge Advocate General. Lieutenant Commander Morgan's report lists as an opinion that pilot error was "[t]he most probable cause of the accident."

Rainey and Knowlton disagree with Lieutenant Commander Morgan's opinion. In a letter written to Lieutenant Commander Morgan about the "aircraft mishap," Rainey, also a flight instructor with the United States Navy, concluded that the mishap was not the result of pilot error but more probably "caused by some form of pneumatic sensing/fuel flow malfunction, probably in the fuel control unit." According to Rainey, this malfunction prompted an inflight "power interruption" or "rollback" making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight. Knowlton agreed with Rainey's conclusion and on April 15, 1983 Rainey and Knowlton filed separate suits in the United States District Court for the Northern District of Florida, alleging negligence and strict product liability causes of action. Beech Aircraft Corporation, the manufacturer of the T-34C Turbo-Mentor aircraft, Pratt and Whitney Canada, Inc., the manufacturer of the engine incorporated into the T-34C aircraft, and Beech Aerospace Services, Inc., the United States Navy's contract maintenance service for the T-34C aircraft, were named as defendants.

At trial, the only disputed issue was the cause of the fatal crash. Because both Lieutenant Commander Rainey and Ensign Knowlton were not available to testify and because the aircraft was almost totally destroyed by fire, the parties relied heavily on opinions developed by expert witnesses. The defendants also relied on the opinions contained in the investigative report prepared by Lieutenant Commander Morgan. Pointing to Lieutenant Commander

Morgan's opinion that pilot error was the most probable cause of the crash, the defendants argued that they should not be held responsible. The jury agreed.

On August 1, 1984 Rainey and Knowlton, complaining about two of the trial judge's evidentiary rulings, filed a motion for a new trial.[4] The judge denied the motion. This appeal promptly followed.

II.

The district court admitted into evidence, over Rainey and Knowlton's objection, excerpts from the investigative report prepared by Lieutenant Commander Morgan.[5] On appeal, Rainey and Knowlton argue that many of the excerpts from the investigative report, specifically Lieutenant Commander Morgan's opinions, should not have been admitted into evidence because these opinions did

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[4] Rainey and Knowlton objected to the admissibility of several opinions contained in Lieutenant Commander Morgan's investigative report. Rainey and Knowlton also objected to the restriction of Rainey's trial testimony. These objections are now raised on appeal.

[5] On March 20, 1984, at the pretrial conference, the district court ruled that Lieutenant Commander Morgan's report was trustworthy and admissible but "only on its factual findings and would not be admissible insofar as any opinions or conclusions are concerned." On July 10, 1984, the day before trial, the district court reversed in part its prior ruling. At that time, the judge decided to admit into evidence the opinions and conclusions contained in the investigative report.

In light of the court's ruling, Rainey and Knowlton requested an opportunity to review Lieutenant Commander Morgan's report and "leave, in the event we so decide, to call as a witness such person or persons who might not have been called at this trial, but who could present evidence concerning that conclusion [that pilot error was the "most probable cause" of the crash] and the trustworthiness of it." The district court granted the request.

not fall within the public records exception to the general hearsay rule.[6]

To be admissible, the excerpts from Lieutenant Commander Morgan's report must satisfy the hearsay exception for public records and reports. *See* Fed. R. Evid. Rule 803(8) provides a hearsay exception in civil actions for "factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." Lieutenant Colonel Habermacher, with authorization from the Manual of the Judge Advocate General § 0902, at 9-3 to -5, appointed Lieutenant Commander Morgan to conduct an investigation into the circumstances surrounding the aircraft accident. Lieutenant Commander Morgan's report, since it was prepared in conjunction with an authorized Judge Advocate General investigation, is a public record. Moreover, because no evidence was introduced to show that the report lacked trustworthiness, we find that the report was indeed

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[6] The following opinions were admitted into evidence:

1. Examination of the findings of fact, aircraft history, and inspection records indicate no irregularities which can be specified as a cause of the crash of 3E955.

2. There is no factual evidence of command or supervisory error.

3. There is no factual evidence to indicate that LCDR Rainey or ENS Knowlton were not physically, socialogically [sic], or mentally prepared to complete their flight.

4. There is evidence to indicate that the failure of ENS Knowlton's rotary buckle may have contributed to the severity of his head injury.

* * * * *

7. The most probable cause of the accident was the pilots failure to maintain proper interval.

trustworthy.[7] Thus, the factual findings contained in the report are admissible under Rule 803(8).

Cases interpreting Rule 803(8), however, disclose a difference of opinion as to the meaning of "factual findings." *Compare Complaint of American Export Lines, Inc.*, 73 F.R.D. 454, 458 (S.D.N.Y. 1977) (evaluative conclusions or opinions are not "factual findings"); *with Complaint of Paducah Towing Co.*, 692 F.2d 412, 420 (6th Cir. 1982) (evaluative reports are admissible as "factual findings" if

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[7]. The Advisory Committee on the Proposed Rules notes that Fed.R.Evid. 803(8) "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Fed.R.Evid. 803(8) advisory committee note. Thus, the burden was upon Rainey and Knowlton to show that the report was inadmissible because its sources of information or other relevant circumstances indicated a lack of trustworthiness. *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1316 (3d Cir. 1978) (citing *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178 (5th Cir. 1975)). That burden was not met here.

Rainey and Knowlton argue that they were unable to meet their burden because they were surprised by the district court's ruling the day before trial admitting into evidence Lieutenant Commander Morgan's opinions. But Rainey and Knowlton knew months before trial that the defendants would seek to admit Lieutenant Commander Morgan's report into evidence. Still, Rainey and Knowlton made no effort to attack the qualifications of Lieutenant Commander Morgan or the methodology he employed in conducting the investigation. In fact, when the trustworthiness of the report was discussed during the pretrial conference, Rainey and Knowlton admitted that there was no evidence to indicate that the report was untrustworthy.

On July 10, 1984 when the judge decided to admit the opinions into evidence, he granted Rainey and Knowlton leave to review the report and, if they so chose, to present evidence concerning the trustworthiness of the opinions. Rainey and Knowlton presented no such evidence, and did not seek a continuance.

Thus, in light of the fact that there was no evidence presented to show that the report lacked trustworthiness we agree with the district court in finding that the report was trustworthy.

based upon circumstantial evidence) (citation omitted).[8] In deciding how to interpret "factual findings" in the context of this case, we are bound by the Fifth Circuit's interpretation in *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980).[9] In *Smith,* the Fifth Circuit considered the admissibility of a Coast Guard Marine Board of Investigation Report and found that the "evaluative conclusions and opinions of the Coast Guard Marine Board of Investigation contained in the report should not have been admitted into evidence." *Id.* at 222. The Fifth Circuit noted that:

> the language of Rule 803 suggests that "factual findings" defines something other than "opinions" and "diagnoses" which are admissible under Rule 803(6) when contained in the record of "a regularly conducted business activity." Rule 803(8), although similar to Rule 803(6), substitutes the term "factual findings" for "opinions" and "diagnoses." Since these terms are used in similar context within the same Rule, it is

[8] The legislative history of the Rule reveals the origins of the conflict. The House Committee on the Judiciary intended that " 'factual findings' be strictly construed and that evaluations or conclusions contained in public reports shall not be admissible under this Rule." H.R.Rep. No. 93-650, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7051, 7075, 7088. On the other hand, the Senate Committee on the Judiciary took "strong exception to this limiting understanding of the application of the rule." S.Rep. No. 93-1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7051, 7064. The Senate Judiciary Committee recommended a liberal interpretation of "factual findings" so as to include "evaluative reports." *Id.* The Advisory Committee on the Proposed Rules also suggested that "factual findings" might encompass evaluative reports. *See Fed. R.Evid. 803(8) advisory committee note.*

[9] The Eleventh Circuit in *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), adopted as precedent decisions of the former Fifth Circuit rendered to October 1, 1981.

> logical to assume that Congress intended that the terms have different and distinct meanings.

612 F.2d at 221-22 (citations omitted). Thus, while the defendants urge us to follow "[t]he prevailing view . . . that all evaluative conclusions are within the scope of Rule 803(8)(C)," *Walker v. Fairchild Industries,* 554 F.Supp. 650, 653 (D.Nev. 1982) (citations omitted); *see also Cohen v. General Motors Corp.,* 534 F.Supp. 509, 512 (W.D.Mo. 1982) ("it appears that the more expansive reading [of Rule 803(8)] is gaining favor") (citations omitted), we are not free to do so. The Fifth Circuit in *Smith* clearly launched this court's precedent in a different direction, a direction we must follow. We therefore hold that the district court erred in admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's report.

Having concluded that the district court erred in admitting into evidence these evaluative conclusions and opinions, we must now determine whether this error was harmless. *See Collins v. Wayne Corp.,* 621 F.2d 777, 782 (5th Cir. 1980). We hold that it was not.

Several of Lieutenant Commander Morgan's opinions touched on the cause of the aircraft crash — the ultimate issue the jury was to decide. These opinions were submitted to the jury without ever having been tested by cross-examination. Moreover, the defendants were able to capitalize on the improper admission of these opinions by highlighting the opinions to the jury during closing argument. The jury returned a verdict for the defendants but the improper admission of Lieutenant Commander Morgan's opinions may have influenced this verdict. The admission of these opinions, therefore, cannot be considered harmless. The district court committed reversible error; Rainey and Knowlton must be afforded a new trial.

III

Another issue raised by this appeal is whether the district court improperly restricted Rainey's trial testimony. A.H. Toothman, counsel for Beech Aircraft Corporation, called Rainey as an adverse witness. Rainey was questioned about the letter he had written to Lieutenant Commander Morgan about the "aircraft mishap." The questions concerned paragraphs two and four of the letter. In paragraph two, Rainey had written that before the training exercise, his wife, Lieutenant Commander Rainey, was under "unnecessary" pressure. According to Rainey, his wife had attempted to cancel the exercise "[o]n three separate occasions," and "was observed to terminate [one] conversation in an uncharacteristically heated and disgusted manner." In paragraph four, Rainey had written that the aircraft piloted by his wife violated pattern integrity . . . as it turned crosswind without proper interval." Rainey had also admitted that either his wife or Ensign Knowlton "react[ed] instinctively and abruptly by initiating a hard right turn, away from [the aircraft piloted by Lieutenant Colonel Habermacher]." Because these statements tended to support the defendants' theory that pilot error led to the crash, the district court, over Rainey and Knowlton's objection, permitted Mr. Toothman's inquiry.

During Rainey's cross-examination, however, the district court sustained the defendants' objection to the following question propounded by Dennis K. Larry, counsel for Rainey and Knowlton: "In the same letter to which Mr. Toothman made reference to in his questions, sir, did you also say that the most probably [sic] primary cause of this mishap was rollback?" The district court did not allow the question, holding that the question improperly sought to elicit an opinion from a non-expert

witness. On appeal, Rainey and Knowlton argue that the district court improperly excluded Rainey's testimony.[10] We agree.

A district court's evidentiary rulings are discretionary and "will not be disturbed on appeal absent a clear showing of an abuse of discretion." *United States v. Russell,* 703 F.2d 1243, 1249 (11th Cir. 1983) (citations omitted). Under this standard, we must conclude that the district court committed reversible error in limiting Rainey's testimony.

Federal Rule of Evidence 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Rule 106 is based on the "rule of completeness," and seeks to avoid the unfairness inherent in "the misleading impression created by taking matters out of context."[11] Fed.R.Evid. 106 advisory committee note.

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[10] Federal Rule of Evidence 103(a)(2) cautions that error may not be predicated upon a ruling excluding evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." *United States v. Winkle,* 587 F.2d 705, 710 (5th Cir.) (quoting Fed.R.Evid. 103(a)(2), *cert. denied,* 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979)); *see also* 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 103 [03] (1985). While Rainey and Knowlton failed to make an offer of proof indicating the substance of Rainey's excluded testimony, the substance of the testimony was readily apparent from the language of the question the defendants objected to.

[11] Technically, Rule 106 is limited in its application to instances when a party introduces a writing or recorded statement into evidence. Here, we find the defendants' questions concerning Rainey's letter tantamount to the introduction of the letter into evidence. We therefore apply the concerns of the Rule – fairness and completeness – to this case.

Here, Rainey was questioned about a letter he had written to Lieutenant Commander Morgan. The defendants questioned Rainey about several statements in this letter that, in isolation, seemed to support the defendants' position that pilot error caused the crash. Mr. Larry, counsel for Rainey and Knowlton, sought to place these statements in perspective by questioning Rainey about paragraph five of the letter. In paragraph five, Rainey had concluded that "[t]he most probale [sic] primary cause factor of this aircraft mishap is a loss of useful power (or rollback) caused by some form of pneumatic sensing/fuel flow malfunction." This statement would have placed the prior statements in context and clearly rebutted the misleading impression created by the prior statements alone.

The court, therefore, erred in permitting the defendants to examine Rainey about portions of his letter while prohibitting cross-examination about other relevant portions.[12] Because paragraph five of the letter would have harmonized the prior statements with Rainey's stance at trial, the jury was given an incomplete and misleading impression of Rainey's position. Under the "rule of completeness" embodied in Rule 106, the limitation of Rainey's testimony was thus inherently unfair and an abuse of discretion. Rainey and Knowlton are entitled to a new trial.

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[12] The district court's limitation of Rainey's testimony was erroneous for another reason as well. As Rainey and Knowlton noted, the district court permitted the defendants' inquiry into Rainey's letter, finding the statements in the letter admissible against Rainey as a prior inconsistent statement under Fed.R.Evid. 801(d)(1)(A) and admissible against Knowlton as an adoptive admission under Fed.R.Evid. 801(d)(2)(B). Mr. Larry sought to question Rainey about paragraph five of the letter. Rainey and Knowlton contend that Rainey's statement in paragraph five should have been ruled admissible under Fed.R.Evid. 801(d)(1)(B) as "a prior consistent statement made by him offered to rebut an implied or express charge that in other parts of his letter he had made statements inconsistent with his trial theory." Brief for Appellants at 28-29. We agree.

IV.

We hold that the trial judge committed reversible error in 1) admitting into evidence the evaluative conclusions and opinions contained in Lieutenant Commander Morgan's investigative report and 2) limiting Rainey's trial testimony. We therefore reverse the judgment entered against Rainey and Knowlton and remand for a new trial.

REVERSED AND REMANDED.

JOHNSON, Circuit Judge, concurring specially:

I concur with the panel's opinion in this case. I write separately to urge that, while we are clearly bound by *Smith v. Ithaca Corp.*, 612 F.2d 215 (5th Cir. 1980), to hold that the evaluative conclusions contained in Lieutenant Commander Morgan's report are not admissible under Fed.R.Evid. 803(8)(c), our interpretation of this rule is ripe for reconsideration.

Smith is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(c)'s "factual findings" standard. *See, e.g., Ellis v. International Playtex, Inc.*, 745 F.2d 292, 300-301 (4th Cir. 1984) ("[I]t is well established that the phrase should be interpreted broadly"). Weinstein's evidence treatise advocates such a reading, *Weinstein on Evidence* § 803(8)[3][03] (1985) ("[i]f the report states a conclusion that would be helpful – and is reliable – it should be admitted"), and the Advisory Committee's Note may be read as consonant with this interpretation, *id.*

Broad admissiblity releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question. This case presents an appropriate opportunity for reconsideration of this critical evidentiary issue by the full Court.

DOCKET NO. PGA 83-4084

IN THE

United States District Court

July Term, 1984

RONDI M. KNOWLTON,
Individually and as Personal Representative of the Estate
of
DONALD BRUCE KNOWLTON

v.

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES INC., *et. al*

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC.; and PRATT AND WHITNEY AIRCRAFT OF CANADA, LTD. recovered of the plaintiff RONDI M. KNOWLTON

/s/ WINSTON E. ARNOW,
Senior Judge

Dated at Pensacola, Florida

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U.S. DISTRICT CT.
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PENSACOLA, FLA.

DOCKET NO. PGA 83-4084

IN THE

United States District Court

July Term, 1984

JOHN C. RAINEY,
Individually and as Personal Representative of the Estate of
BARBARA A. RAINEY

v.

BEECH AIRCRAFT CORPORATION,
BEECH AEROSPACE SERVICES INC., *et. al*

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendants BEECH AIRCRAFT CORPORATION, BEECH AEROSPACE SERVICES, INC.; and PRATT AND WHITNEY AIRCRAFT OF CANADA, LTD. recovered of the plaintiff JOHN C. RAINEY

/s/ WINSTON E. ARNOW,
Senior Judge

Dated at Pensacola, Florida

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PENSACOLA, FLA.